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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

In the matter of:	)	
Chibardun Telephone Cooperative Inc.	)	
	)	CC Docket No. 97-219
Petition for Preemption of the Ordinances,	)	
Fees and ROW Practices of the	)	
City of Rice Lake, Wisconsin	)	

REPLY COMMENTS
OF CITY OF ST. LOUIS COMMUNICATIONS DIVISION

Introduction

We submit these comments as a very interested observer of the evolving telecommunications scene, and based on our extensive research of PROW ordinances and cable franchises in numerous jurisdictions across the country. We write out of a concern that local governments are continually at a disadvantage before the Commission based on an apparent philosophy that telecommunications deployment should be the first and highest priority of all local governments, just as it is at the Commission. We write out of a concern that local governments are continually and unfairly castigated as "barriers to entry" by industry simply because their priorities/timetables and our priorities/timetables are often necessarily at odds. We write out of a concern that the Commission continues to ignore realities faced by local governments which must deal with many, many requirements and limitations in the face of a recent explosion of telecom providers and infrastructure: balanced budgets, sunshine laws, volunteer city councils, administrative due process, compliance with rules and deadlines from other federal agencies, citizen satisfaction, limited resources, state municipal codes and antique charters (to name but a few).

Before getting into the specific problems of the Rice Lake case, the City of St. Louis would appreciate this Commission taking a few moments to familiarize itself with the very real general issues for local government that arise out of the Telecom Act and Public-Right-of-Way management issues.. We trust this new Commission when it indicates a willingness to do its homework before it issues its decrees.

For the reasons cited above and below, the City of St. Louis Communications Division supports and joins with the City of Rice Lake and other local governments in requesting that Chibardun's petition be dismissed or denied.

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List A B C D E

I. National Policy should not be developed piecemeal without comprehensively and fairly approaching all issues and all parties to preemption decisions.

Once again the telecom industry teams up on a small community of 8,000 (only three times as large as the entire FCC and smaller than the workforces of many RBOCs) to try setting an example to the rest of the country. Rice Lake is to be commended for its thorough and documented factual response to Chibardun's petition. The "facts" as presented in Chibardun's petition are not supported by hard evidence provided by the City of Rice Lake. Chibardun seems to be playing a confusing game regarding preemption and definitions of "barriers to entry": request permits 10 days before construction is to start, withdraw the permit applications and cancel the construction, then 4 months later complain to the Commission about the lack of permits, and a draft ordinance not yet passed. And yet the telecom industry has jumped in with comments. We have to ask ourselves, "why Rice Lake of all places"?

Therefore, it is dangerous for a federal agency to set "policy" on a piecemeal example basis with acknowledging fully that *individual* preemptions of local rules or interpretations of federal law/rules cannot possibly address the myriad activities in 15,000 municipalities and over 1,000 counties nationwide. Industry allegations not withstanding, most local governments are looking for a balance between pro-competitive attitudes towards the industry and fiscal responsibility to their taxpayers. A balance between a single provider's antique and undisturbed infrastructure, and multiple new provider infrastructures under construction now.

The most important - and unfinished -business of the Telecom Act and the FCC should have been to *remove* any advantages enjoyed by century old providers under a "monopoly universal service public interest" paradigm. Although not directly at issue here, we take this opportunity to point out that the "problem" of incumbents is a real issue in many states. If any state or local state law from 100 years ago is still cited by incumbents to defend their turf or preserve antique advantages inadvertently left over from a monopolist era, they should be struck down under 253(a) of the Act. This includes "free" use of public-rights-of way for infrastructure deployed decades ago by one monopoly company in exchange for meeting universal service public interest requirements.

If all such rules are removed by federal preemption, it is easy to craft new ones applicable to all players

in a new competitive paradigm. Old franchises or grants of authority could be preempted in favor of nationally mandated level playing fields for all players; a playing field that is not set at "zero" compensation in the face of new construction; a playing field which does not involve hapless local governments in expensive legal battles trying to receive the compensation and/or cost recovery from all players that is their due. This Division had exactly those discussions with the offices of both Congressmen Gephardt and Markey in 1995, prior to passage of the Act. Both assured us that the intent of sections related to "level playing fields" was not to be a base of "Zero" for public-right-of-way compensation in a competitive environment. The statutory language of Section 2253© confirms that intent.

The federal (Commission) and state reluctance to address this problem has devolved onto the shoulders of the level of government least equipped to make the change, and the one most affected by the direct cost burden of competitive telecom infrastructures in our streets.

Local governments are inundated by new requests for conduits, towers, antennas; that in themselves creates new dilemmas due to new construction burdens not even thought of 10 years ago. The dilemma faced by local and state government is how to respond to a federally-changed market paradigm when old state-imposed regulatory or compensation models were not also changed, and when local governments may not have the authority (by statute or charter) to make the regulatory changes themselves.

The struggle to find the response appropriate for each local community has consumed us, and been further complicated by (Star Trek Captain) Jean-Luc Picard style "make it so" attitudes from M Street. We aren't notified of FCC rulings, we don't individually have expensive Washington lobbyists angling for deals, and telecom issues cannot always be at the top of the hierarchy of all things important for ourselves and our national associations. The FCC staff criticizes or condemns us for not being expert in an exploding field, trashes recent ordinances passed before the 1996 Telecom Act, refuses to even read standard zoning and building codes language before it preempts them, and seems to require that we drop everything else to "do it right now" after the Telecom Act.

Some of the problems we face as a result of a federally changed paradigm are outlined in the following chart.

TELEPHONY **MONOPOLY MODEL 1890 - 1990**	**TELECOMMUNICATIONS** **COMPETITIVE MODEL 1990 >on**
one system emerged with one LEC	multiple providers and systems
circa 1900 public interest requirement for universal service by monopolist to reach all residential and business customers (ditto for essentials like water, gas, sewer and electric)	selective deployment allowed with no universal service requirement in the public interest to reach all customers
copper pair twisted wire on poles some underground conduit few thousand antennas/towers nationwide	fiber in underground conduit 40,000 wireless towers and antennas nationwide and expected to double in 10 years
Existing Neighborhoods: little or no "new" construction or upgrades in older established areas	Existing Neighborhoods: construction of miles of new plant, conduit and manholes in the streets of older downtowns and/or business areas
New Commercial/Residential Areas: "new" construction as part of expansion included in orderly approach for utility easements at time of street and road construction	New Neighborhoods "new" construction only after targeted customers are identified and sold new services
predictable street deterioration and repair or resurfacing needs vis-a-vis PROW budgets	unpredictable street costs and more rapid deterioration due to new conduit deployment
circa 1900 public interest in reaching all consumers sometimes offset by public support of private enterprise and/or lack of private compensation to taxpayers for deployment	public interest requires that direct users should absorb cost of selective deployment to high volume/dollar customers through rates; general class of taxpayers should not subsidize new services to selected taxpayers by absorbing increased costs of infrastructure maintenance
space for wires of essential municipal emergency communications systems	space for computer networks to deliver not only emergency communications but other city services demanded by public (water control, street lights, traffic signalization, data bases, library and city hall access, electronic payment of fees, etc)

II. Local Jurisdictions are not required to subsidize private entities or ignore new and very real costs to ourselves.

Chibardun's petition for preemption of Rice Lake's PROW rules and ordinances seems to contain an implicit suggestion that local governments should subsidize new entrants to the market and their construction in the PROW.

Public streets are acquired, developed, repaired and maintained with taxpayer funds. These funds cannot and should not be used to subsidize new entrants who are not serving all taxpayers and who impose substantial new and additional costs for street acquisition, development, repair and maintenance on the local government budget which is supported with taxpayer dollars.

The "fair share" concept is missing from new providers' vocabularies. When a new cost is imposed on local government - be it administration, asphalt, field labor, inspection or the like - new revenues must be found to pay for it. Unlike federal government, many cities are statutorily required to meet "zero-based" budgeting. If they don't have it, they can't spend it. However, repaving and potholes won't wait.

The function of local government is to provide essential services (snow removal, trash pickup, public housing and health services, street maintenance, traffic movement), ensure orderly development (zoning), manage emergency services (police, fire and ambulance), ensure public safety (building codes), and promote quality of life, in order to attract and keep residents. (We've been in the competitive marketplace for a lot longer than the telecom industry). Our function is not to subsidize a competitive marketplace.

If and when the Commission decides to give away valuable new public spectrum free - (and not require deposits, down payments and repayment schedules) - then and only then should the Commission require local governments to do the same with public streets.[1] Even then, as a federal agency it runs the risk of

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[1] Free "broadcast" spectrum in exchange for meeting certain public interest requirements is somewhat analogous to past "free" street space for incumbent LECs who formerly met certain public interest requirements in a monopoly environment. The Commission is treating new spectrum users differently. Local governments often face a similar situation with new telecom entrants.

issuing an indefensible unfunded mandate.

Federal law (253 a and b) says we cannot statutorily forbid new telecom entry into our jurisdictions. It does not say that we have to allow use of our streets for that purpose to a company that fails to meet standard local requirements. It does not say we have to accord one industry special rights and privileges. The fact that it is cheaper and more convenient for private telecom entities to use public streets for deployment does not require us to give away limited street space. It does not require us to let someone else use space we need for ourselves to deploy city networks essential to delivery of city services in the 21st century.

Chibardun complains about a proposed requirement for city use of space in private conduit. Yet it is completely logical for government to partner with private entities so that both may achieve their goals. Space for government networks in private conduit in public streets is one way to partner or receive rent. Provision of dark fiber or building hookups or lit services are other valid partner/rent approaches. Often these partnerships achieve another dearly-held FCC goal: service to schools and libraries, which has been a lynchpin of thousands of local cable tv franchises long before "educational access' became fashionable on M Street.

III. Chibardun's petition seems to leave out some essential facts and complains that common requirements for PROW usage are somehow discriminatory to itself.

As the City of Rice lake points out in its comments, Chibardun fails to mention cable franchise requirements imposed on incumbent cable operator Marcus, or mention the amount of franchise fees paid for use of the PROW. Chibardun conveniently ignores that a city recoups its administrative and PROW rental costs from a cable operator through a cable franchise fee. A cable or telecom provider which does not pay such a fee may be obligated to pay some other form of PROW compensation (whether percentage, linear foot or cost-recovery) and/or a business tax, or perhaps meet some other type of public interest obligation (such as universal service established years ago in a monopoly environment) or in-kind services as part of rent.

Chibardun admits that the PROW rules in question are not tied to a cable or telephone franchise, but

rather are located in a separate section of the city code relating to Public-Right-of-Way management. It is very important for the Commission to understand that PROW management rules are separate and distinct from any cable franchise or telephone/telecom ordinance. Street management rules predate cable television by decades at least. In St. Louis the management ordinances and rental fees began 100 years ago. These policies and fees are imposed on all providers delivering gas, electric, water and telecom services - and are in the nature of a rental, not a tax.

Chibardun complains that the City tried to respond to the first "new entrant" by devising a general telecom ordinance. Why or how could a local government write a new ordinance until the situation that requires one actually happened? What if the tables were turned? What if Chibardun were the second new entrant after a telecom ordinance was passed and the first new entrant had been granted permits and waivers of requirements prior to a new ordinance, as Chibardun demands for itself? Chibardun would scream. Regulatory parity requires that similar providers of similar services be treated in a similar fashion. If the first provider has to wait more than a few weeks, it should either submit applications and notice to a city a lot earlier, or accept the delay as simply one of the costs of a competitive marketplace. Chibardun does not allege that someone else was allowed in first and differently, because that is not the case.

Chibardun complains about the presence of Marcus Cable representatives at a Cable Commission meeting, as if that were somehow discriminatory. We would like to point out "sunshine law" rules which require that local meetings be open. You can't eliminate public meetings just because someone (whether the decision-making body or your competition) might find out what you really want to do. This is a competitive world, and public disclosure a requirement. Franchise proposals are public documents. Proposal acceptance creates legally binding commitments on both parties. Everything else is just talk.

Chibardun complains that it was required to provide evidence of state certification as a public utility, yet demands that the City treat it as a public utility. If not a public utility (at least in the general sense) there is no city obligation to grant a private entity permanent use of public streets.

Chibardun alleges that it did not receive permits as promptly as other entities - but those entities already

hold authorizations from the City that addressed (to the City's satisfaction) all the outstanding legal and technical issues related to PROW occupancy. Chibardun does not.

Before the Telecom Act, cable operators were not providing telephony, and after the Telecom Act local governments many not govern telephony services under existing Title VI franchises. Obviously a cable operator, such as Marcus, which is not doing telephony/telecom under Title II does not need a telecom license or contract under Title II. Until and unless Marcus Cable offers telephony, and such telephony services are not treated by the City under Title II regulations, there is no inequity to Chibardun.

Most cable, telephone or PROW-related local regulations require bonds, insurance and indemnification. There is no logical reason for a local government to permit construction in its public places without such requirements. Furthermore, indemnification of local governments was a statutory mandate of the 1992 Cable Act. If Chibardun wants equal treatment, it should acquiesce to universal requirements for street use.

Chibardun complains that it *might* have to move lines at a later date. Most local regulations require that permits to use streets are *revokable*, i.e. subject to revocation later based on public decisions: to vacate a street, to undertake extensive repair or rebuilding of bridges and roads, construct public works projects or redevelopments. While a cable or telecom provider might not like it, neither party can predict the needs of the future, and the convenient use of public streets rather than private property carries with it the risk that future public use may have to change. Many (if not most) cable or telephone franchises routinely include such requirements. Many telecom systems are familiar with the rule of thumb which states that cheaper capital costs for deployment often require higher maintenance costs for operation (and vice versa).

Chibardun complains that if it sold its system, such sale would require approval. Obviously. In the same manner that sales of broadcast facilities using public spectrum require federal approval, sales of local systems must be approved since the new corporate owner must provide the bonds, insurance and indemnification agreements that were imposed on the departing corporation. Failure of the new owner to agree to do so are legitimate grounds for not approving the sale. Especially in the climate of mergers, acquisitions, turnkey projects and system sales encouraged by the competitive paradigm, it

would be foolish for any jurisdictional landlord to fail in conducting due diligence on all corporate financial and ownership matters that affect street occupancy.

Chibardun complains that it would be required to post an irrevocable letter of credit during its tenancy. I don't know of any landlord that does not require some sort of deposit to ensure protection against damages, destruction of property, liability, lawsuits resulting from occupancy, etc. This is especially true during new construction, when the damage risks to infrastructure and private property are the greatest. It continues to be true throughout the length of the tenancy.

The most interesting aspect of these complaints is that the interpretation of "facts" as cited by Chibardun appear to be inaccurate and incomplete. The Commission's own directives require that challenges under Section 253 be supported by explicit evidence. The City of Rice Lake has provided detailed and documented explanation, affidavits and dates for its actions. Chibardun has mis-represented the facts in order to avoid regulatory parity. Such attempts should not be condoned or rewarded by the Commission, assuming the Commission even has authority to do so.

IV. The Commission has no jurisdiction to preempt local government actions or proposed actions taken under the statutory rights granted in Section 253© of the Act.

The City of St. Louis Communications Division believes Rice Lake is correct in asserting that it has behaved in a pro-competitive manner and has not prohibited entry under Section 253(a) or (b) of the Act. The record before the Commission in Rice Lake's Comments on the Petition and Motion to Dismiss or Deny makes this abundantly clear and we will not repeat the facts already stated therein.

We support Rice Lake's contention that any local actions that might be taken under Section 253© governing right-of-way management is beyond the scope of Commission authority. Nor can the Commission appropriately respond to complaints about an action that has not yet happened. We urge the Commission to exercise restraint by not issuing opinions about theoretical situations based on misrepresentation of the facts, which would merely encourage more telecommunications entities to file frivolous petitions which unfairly burden the resources of local governments, especially smaller ones.

CONCLUSION

The Commission should dismiss or deny the Petition of Chibardun because it raises issues which are both outside the scope of Commission jurisdiction and not ripe for review. The fact that Chibardun does so by a misrepresentation of facts, makes it especially important that the Commission should send a clear message that such tactics will not be condoned.

Respectfully submitted this 6th day of January 1998.

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